

ILLINOIS POLLUTION CONTROL BOARD
November 8, 1984

ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Complainant,)
)
v.) PCB 79-145
)
CELOTEX CORPORATION and)
PHILIP CAREY COMPANY,)
)
Respondents.)

ORDER OF THE BOARD (by B. Forcade):

On October 25, 1984, respondents, The Celotex Corporation and Philip Carey Company, ("Celotex") filed an application for nondisclosure in an envelope stamped "Not Subject to Disclosure." According to 35 Ill. Adm. Code 101.107(c)(3), material marked "not subject to disclosure" is automatically afforded confidential treatment until a ruling by the Board. On November 1, 1984, the Illinois Environmental Protection Agency ("Agency") filed a response to Celotex's application.

This matter arose when the Agency, in discovery, requested production of the Analyses of Wastes which was done in the spring of 1976 by Erickson Chemical Company on samples of materials disposed of at the landfill at issue. In a September 25, 1984 response, Celotex objected claiming a protection against disclosure from discovery based on attorney-client privilege and attorney work product privilege. In an October 2, 1984 reply the Agency objected to the privilege and requested in camera inspection by the Board. By Orders of October 5 and 15, 1984, the Hearing Officer provided for submission to the Board of the material in question and memoranda.

Celotex's attorney states by affidavit that the material in question is the result of services performed by Erickson for that attorney in contemplation of litigation and is thus not subject to disclosure. The Agency argues that Supreme Court Rule 201(b) requires disclosure of objective and material information such as this and that the material is discoverable. Thus, the Board must address two questions, whether the material is subject to discovery and whether the material may be disclosed to the public under Section 7 of the Illinois Environmental Protection Act ("Act") and 35 Ill. Adm. Code 101.107.

The Board finds the material in question is subject to discovery . In Consolidation Coal Co. v. Bucyrus-Erie Co, 432 N.E. 2d 250, 89 Ill. App. 2d 103 (1983), the Illinois Supreme Court evaluated the Attorney-Client and work product privilege as it applies to technical reports. When dismissing the privilege as it pertained to a metallurgical report the Court stated:

The report is actually a notebook that contains objective and material information consisting of mathematical computations, formulae, tables, drawings, photographs, industry specification data, and handwritten notes. It does not reflect or disclose the theories, mental impressions or litigation plans of B-E's attorneys. Nor is it the product of the attorney's mental processes (Supra, at 254).


Here, the material in question is objective and material information that does not reflect or disclose the theories, mental impressions or litigation plans of Celotex's attorney, nor is it the product of his mental process. Neither was the material prepared by Celotex and communicated to the attorney in confidence. Thus, the material in question here is subject to discovery.

Additionally, the material in question is subject to disclosure. Section 7(d) of the Act provides that material describing "the quantity and identity of substances" placed in landfills "may under no circumstances be kept confidential." The material in question here describes the identity and quantity of such substances and may not be kept as confidential.

Celotex is directed to provide the subject material to the Agency under discovery within seven (7) days of the date of this Order. The Clerk of the Board is directed to release the material to the Board's public files, after 35 days.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 9th day of November, 1984 by a vote of 6-0.



 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board